UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

FEDERAL DEPOSIT INSURANCE CORPORATION AS RECEIVER FOR WESTSOUND BANK, Plaintiff, v. EDUARD DAVIDYUK, et al., Defendants.	CASE NO. C13-1592JLR ORDER ON CROSS MOTIONS FOR SUMMARY JUDGMENT

I. INTRODUCTION

Before the court are: (1) Plaintiff Federal Deposit Insurance Corporation as Receiver for Westsound Bank's ("FDIC-R") motion for a decree of judicial foreclosure and award of attorney's fees on summary judgment (FDIC Mot. (Dkt. # 9)), and (2) Defendants Eduard Davidyuk and Larissa Davidyuk's cross motion for summary judgment (Def. Mot. (Dkt. # 12)). The court has considered the motions, all submissions filed is support of and opposition thereto, the balance of the record, and the applicable

law. The court also heard the argument of counsel on June 23, 2014. Being fully advised, the court GRANTS FDIC-R's summary judgment motion for a decree of judicial foreclosure and an award of attorney's fees under the Deed of Trust at issue. The court DENIES Defendants' cross motion for summary judgment, except with respect to their motion regarding Ms. Davidyuk. The court GRANTS Defendants' motion for summary judgment only with respect to Ms. Davidyuk and DISMISSES her with prejudice from this action.

II. BACKGROUND

On July 11, 2006, Defendant Eduard Davidyuk took out a loan from Westsound Bank to buy real property and build a single family residence in Bellevue, Washington. (Rossiter Aff. (Dkt. # 10) ¶ 4.) The loan was in the form of a promissory note by Mr. Davidyuk in the principal amount of $1.4 million payable to Westsound Bank d/b/a Westsound Mortgage ("the Note"). (Rossiter Aff. ¶ 5, Ex. A.) The Note was secured by a recorded Deed of Trust, dated July 11, 2006. (Request for Judicial Notice ("RJN") (Dkt. # 11) Ex. 1.)[1]

[1] Plaintiff FDIC-R has requested that the court take judicial notice of certain facts and several documents that it submits in support of its motion for summary judgment. (Request (Dkt. # 11).) The documents the FDIC-R submits are: the Deed of Trust at issue here, modifications to the Deed of Trust, a complaint filed in King County Superior Court for the State of Washington, a judgment by default and a copy of the docket in the same state court case, and a press release issued by the Federal Deposit Insurance Corporation announcing the closure of Westsound Bank by the Washington Department of Financial Institutions and the appointment of the FDIC-R as receiver. (*See id.* Exs. 1-7.) FDIC-R requests that the court take judicial notice of facts derived directly from these documents. (*Id.* at 3-6.) Defendants do not object to FDIC-R's request. (*See generally* Dkt.; Def. Mot.) Indeed, Defendants repeatedly rely upon the facts and documents submitted by FDIC-R in their own cross motion for summary judgment. (*See* Def. Mot. at 4.) The court finds that the documents submitted by FDIC-R and the facts derived

Mr. Davidyuk modified the loan terms with Westsound Bank three times. First, on June 28, 2007, he entered into an agreement which extended the maturity date and increased the available principal to $1.5 million. (Rossiter Aff. ¶ 6, Ex. B.) He entered into a modification to the Deed of Trust to secure the additional $100,000.00 of debt, which was recorded on July 27, 2007. (*See* RJN Ex. 2.) Second, on February 1, 2008, he entered into a Change of Terms Agreement with Westsound Bank, which extended the maturity date, changed the interest rate, and increased the available principal by $172,000.00 to $1,672,100.00. (Rossiter Aff. ¶ 7, Ex. C.) He entered into a modification of the Deed of Trust to secure this additional $172,000.00, which was recorded on March 5, 2008. (*See* RJN Ex. 3.) Third, on April 15, 2008, he entered into another Change of Terms Agreement with Westsound Bank to alter the maturity date of the loan to August 10, 2008. (Rossiter Aff. ¶ 8, Ex. D.)

Westsound Bank filed a complaint against Mr. Davidyuk on September 26, 2008, in King County Superior Court for the State of Washington, alleging that he had defaulted on his loan obligations. (*See* RJN Ex. 4.) On May 6, 2009, King County Superior Court awarded Westsound Bank a default judgment against Mr. Davidyuk. (*See id.* Ex. 5.) Judgment was entered against Mr. Davidyuk in the amount of $1,648,355.48, plus pre-judgment interest, attorney's fees, costs, and expenses, totaling $1,766,760.44. (*See id.*) Mr. Davidyuk did not appeal this judgment (*see id.* Ex. 6), and he has made no payments on the judgment to Westsound Bank (Rossiter Aff. ¶ 10). The parties do not

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therefrom are appropriate for judicial notice under the Federal Rules of Evidence, *see* Fed. R. Evid. 201(b)(2), and therefore GRANTS FDIC-R's request.

dispute that, although Westsound Bank sued on the Note and obtained a default judgment, Westsound Bank did not seek to foreclose on the property. (*See* FDIC-R Mot. at 4-5, 8-9; Def. Mot. at 4.)

Two days later, on May 8, 2009, the Washington State Department of Financial Institutions closed Westsound Bank and appointed FDIC-R as receiver. (*See id.* Ex. 7.) As Westsound Bank's successor-in-interest, FDIC-R assumed all of Westsound Bank's rights, titles, powers, privileges, operations, and assets. (Rossiter Aff. ¶ 10.) Due to its appointment as receiver, FDIC-R became the holder of the Note and the beneficial interest in the Deed of Trust. FDIC-R has not received any payment on the judgment since it succeeded to Westsound Bank's assets, although insurance proceeds were applied to reduce the interest due on the judgment. (Rossiter Aff. ¶ 11.) The amount of $2,045,102.40, including interest through April 2014, is currently due and owing on the judgment. (*Id.* ¶ 12.)

On August 29, 2012, FDIC-R filed a complaint against Defendants for judicial foreclosure in King County Superior Court. (Notice (Dkt. # 1) ¶ 3.) On June 7, 2013, Defendants filed an Answer, Affirmative Defenses, and Set-Offs in response to FDIC-R's complaint. (*Id.* ¶ 3.) Unlike Westsound Bank's action in King County Superior Court against Mr. Davidyuk on the Note, the FDIC-R's action for judicial foreclosure included Ms. Davidyuk as a defendant. (*See id.* Ex. A.)

On September 4, 2013, over a year after filing in state court, FDIC-R removed the suit to federal district court. (*See generally* Notice.) Defendants did not initially oppose FDIC-R's removal by filing a motion for remand. On April 17, 2014, FDIC-R filed this

motion for summary judgment seeking a decree of judicial foreclosure on the property and an award of attorney fees under the Deed of Trust. (*See generally* FDIC-R Mot.) FDIC-R argues that Defendants various affirmative defenses are either invalid or do not otherwise prevent the entry of summary judgment in its favor. (*See id.* at 8-19.)

On May 5, 2014, Defendants responded to FDIC-R's motion and also cross-moved for summary judgment. (*See generally* Def. Mot.) Although Defendants did not move for remand when FDIC-R initially removed this case to federal court, they now argue in their cross-motion for summary judgment that FDIC-R improvidently removed the action from state court and that this court therefore lacks subject matter jurisdiction. (*Id.* at 8-15.) Defendants also argue that (1) this action must be dismissed because the statute of limitations on the Note has expired (*id.* at 15-16), and (2) Ms. Davidyuk should be dismissed because she is an improper party (*id.* at 16-19). Finally, Defendants argue that their various affirmative defenses prevent the entry of summary judgment in FDIC-R's favor and that FDIC-R is not entitled to an award of attorney fees. (*Id.* at 19-28.)[2]

[2] Defendants filed a cross motion and memorandum in opposition to FDIC-R's motion that is 28 pages long (not including the caption and signature block) and therefore exceeds the page limitation established by the court's local rules. *See* Local Rules W.D. Wash. LCR 7(e)(3) ("Motions for summary judgment . . . and briefs in opposition shall not exceed twenty-four pages."). Defendants did not move for permission to file an over-length memorandum. (*See generally* Dkt.) Under the court's local rules, the court "may refuse to consider any text, including footnotes, which is not included within the page limits." *Id.* LCR 7(e)(6). The court warns Defendants that future failure to abide by the court's local rule on page limitations may result in the court refusing to consider any material outside of the limit. *Id.* Because FDIC-R did not object, however, the court exercises its discretion to consider the entirety of Defendants' memorandum here.

Defendants have raised a challenge to the court's subject matter jurisdiction, and therefore the court must initially address this issue before turning to any others. As discussed below, however, the court finds that it has subject matter jurisdiction over this proceeding, and that FDIC-R is entitled to a decree of judicial foreclosure and an award of attorney fees. As such, the court GRANTS FDIC-R's motion for summary judgment and DENIES Defendants' cross motion.

III. ANALYSIS

A. Standards Governing the Parties' Motions

The parties have styled their motions as cross motions for summary judgment. (*See* Stip. (Dkt. # 13) at 1-2.) The standards that govern such motions under Federal Rule of Civil Procedure 56 are familiar. Summary judgment is appropriate if the evidence, when viewed in the light most favorable to the non-moving party, demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *see Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Galen v. Cnty. of L.A.*, 477 F.3d 652, 658 (9th Cir. 2007). Where cross motions are at issue, the court must "evaluate each motion separately, giving the nonmoving party in each instance the benefit of all reasonable inferences." *ACLU of Nev. v. City of Las Vegas*, 466 F.3d 784, 790-91 (9th Cir. 2006) (citations omitted); *see also Friends of Columbia Gorge, Inc. v. Schafer*, 624 F. Supp. 2d 1253, 1263 (D. Or. 2008).

Defendants have also moved to dismiss under Federal Rule Civil Procedure 12(b)(1) for lack of subject matter jurisdiction. (Def. Mot. at 3.) The Ninth Circuit

recently clarified that the existence of removal jurisdiction should be resolved within the same framework as Rule 12(b)(1) motion. *Leite v. Crane Co.*, --- F.3d ----, 2014 WL 1646924, at *3 (9th Cir. 2014).[3] Under Rule 12(b)(1), a defendant may challenge the plaintiff's jurisdictional allegations in one of two ways: (1) a "facial" attack that accepts the truth of the plaintiff's allegations by asserts that they are insufficient on their fact to invoke federal jurisdiction, or (2) a "factual" attack that contests the truth of the plaintiff's factual allegations, usually by introducing evidence outside the pleadings. *Id.* at *2.

When a party raises a facial attack, the court resolves the motion as it would under Federal Rule of Civil Procedure 12(b)(6)—accepting all reasonable inferences in the plaintiff's favor and determining whether the allegations are sufficient as a legal matter to invoke the court's jurisdiction. *Leite*, 2014 WL 1646924, at *2. When a party raises a factual attack, the court applies the same evidentiary standard as it would in the context of a motion for summary judgment. *Id.* The party invoking the court's subject matter jurisdiction "bears the burden of proving by a preponderance of the evidence that each of

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[3] FDIC-R enjoys broad removal authority under 12 U.S.C. § 1819(b)(2)(B) that goes beyond the privileges that Congress granted under the general removal statue. *See Allen v. FDIC*, 710 F.3d 978, 980-81 (9th Cir. 2014). *Leite* involved the federal officer removal statute under which defendants similarly "enjoy much broader removal rights . . . than they do under the general removal statute." 2014 WL 1646924, at *3. The Ninth Circuit nevertheless concluded that "applying the Rule 12(b)(1) framework to resolve jurisdictional challenges . . . w[ould] not unduly burden the unique rights [the federal officer removal statute] affords removing defendants." *Id.* The court similarly concludes here that applying the Rule 12(b)(1) framework is an appropriate standard for considering Defendants' motion with respect to FDIC-R's removal of this action under 12 U.S.C. § 1819(b)(2)(B).

the requirements for subject-matter jurisdiction has been met."[4] *Id.* However, "if the existence of jurisdiction turns on disputed factual issues, the district court may resolve those factual disputes itself." *Id.*

B. Removal Jurisdiction

FDIC-R removed this action pursuant to a provision of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 ("FIRREA"), Pub. L. No. 101-73, § 407, 103 Stat. 183, 363 (1989), which provides in part that FDIC-R may "remove any action, suit, or proceeding from a State court to the appropriate United States [d]istrict [c]ourt before the end of the 90-day period beginning on the date the action, suit, or proceeding is filed against [FDIC-R] or [FDIC-R] is substituted as a party." (*See* Notice ¶ 5 (quoting 12 U.S.C. § 1819(b)(2)(B).) FDIC-R asserts in its Notice of Removal that Defendants' affirmative defense for "a set off for fraud committed by the original lender" (*id.* Ex. B ("Answer") at 3) is actually a claim "against the Bank alleging fraud by the

[4] Under *Leite*, because FDIC-R removed the action to federal court, thus invoking the court's jurisdiction, it would bear the burden of establishing removal jurisdiction. However, some courts have found that "these general principles are modified by statute and case law in an action where jurisdiction exists because [FDIC-R] is a party." *Applegate v. FDIC*, No. CV410–302, 2012 WL 1099036, at *2 (S.D. Ga. Mar. 30, 2012). For example, the Eleventh Circuit has found that the burden of proving a lack of federal jurisdiction rests on the party opposing FDIC's removal of a proceeding. *See, e.g.*, *Castleberry v. Goldome Credit Corp.*, 408 F.3d 773, 785 (11th Cir. 2005) (placing the burden on the party seeking to defeat removal). The court need not decide this issue, however. Irrespective of whether FDIC-R bears the burden of establishing the court's jurisdiction or Defendants bear the burden of proving a lack of jurisdiction, as discussed in the body of this order below, the court finds that FDIC-R's removal of this action was proper and that the court retains subject matter jurisdiction over this proceeding.

original lender" (*id.* ¶ 7; *see also* FDIC-R Resp. (Dkt. # 19) at 3).[5] In its Notice of Removal, FDIC-R posits that Defendants' assertion of this affirmative defense, which FDIC-R characterizes as a counterclaim, entitles it to remove the action to federal district court.[6] (*See generally* Notice; *see also* FDIC-R Resp. at 3.)

The Ninth Circuit has "expressed a willingness to disregard labels," such as "affirmative defense" or "counterclaim," and "characterize an action according to its substance." *In re Parker N. Am. Corp.*, 24 F.3d 1145, 1155 (9th Cir. 1994). Further, at least one circuit court of appeals has recognized that the filing of a counterclaim against the FDIC will trigger the 90-day removal period under 12 U.S.C. § 1819(b)(2)(B). *See F.D.I.C. v. S & I 85–1, Ltd.*, 22 F.3d 1070, 1074 (11th Cir. 1994) ("We hold that the counterclaims filed by the Defendants constituted an 'action, suit, or proceeding' within the meaning of the statute. We therefore conclude that the filing of those counterclaims triggered FDIC's removal rights.").

Defendants nevertheless move to dismiss for lack of subject matter jurisdiction.[7] (*See* Def. Mot. at 8-15.) Defendants challenge the propriety of FDIC-R's removal of this

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[5] Although it is unclear from either FDIC-R's Notice of Removal or its memorandum in response to Defendants' cross motion for summary judgment, FDIC-R may be asserting that other affirmative defenses alleged by Defendants should also be construed as counterclaims.

[6] FDIC-R alleged in its notice of removal that the court could exercise supplemental jurisdiction under 28 U.S.C. § 1367(a) over the remainder of the state law claims asserted in Defendants' answer. (Notice ¶ 8.)

[7] Section 1447(c) of Title 28 states in part that "[i]f at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded." The Ninth Circuit has held that the mandatory remand language of § 1447(c) applies if a case is removed from state court without proper removal jurisdiction in federal court. *See Albingia*

action from state court on two grounds. First, Defendants assert that even if their affirmative defense can be properly characterized as a counterclaim for fraud, it would fall within the "State actions" exception found in 12 U.S.C. § 1819(b)(2)(D) to FDIC-R's otherwise broad grant of removal authority in 12 U.S.C. § 1819(b)(2)(B). (*Id.* at 8-12.) Second, Defendants assert that they have not exhausted the administrative remedies available under 12 U.S.C. § 1819(d) with respect to their counterclaim for fraud, and the court lacks jurisdiction over any such unexhausted claim or counterclaim. Defendants assert that because the court lacks subject matter jurisdiction over the counterclaim that FDIC-R asserts triggered its right to remove, the removal was improper and the court lacks jurisdiction.[8] (Def. Mot. at 8-15.)

1. State Actions Exception

Section 1819(b)(2)(D) of Title 12 provides an exception, known as the "State actions" exception, to the otherwise broad grant of removal authority provided to FDIC-R in 12 U.S.C. § 1819(b)(2)(B). *See* 12 U.S.C. § 1819(b)(2)(D). Section 1819(b)(2)(D)

Versicherungs A.G. v. Schenker Int'l, Inc., 344 F.3d 931, 937-38 (9th Cir. 2003), *modified on other grounds*, 350 F.3d 916 (9th Cir. 2003) ("[Section] 1447(c) merely addresses the *consequences* of a jurisdictional flaw, *i.e.* it mandates a remand rather than dismissal.") (italics in original; quoting *Parker PPA v. Delia Rocco, Jr.*, 252 F.3d 663, 666 (2d Cir. 2001). Thus, assuming that the court lacks removal jurisdiction as Defendants argue, the appropriate remedy here would be a remand to state court rather than dismissal.

[8] Because Defendants waited more than 30 days to file their present motion asserting a lack of removal jurisdiction, any procedural defects in the FDIC-R's removal are waived. *See N. Cal. Dist. Council of Labor v. Pittsburg-Des Moines Steel Co.*, 69 F.3d 1034, 1037 (9th Cir. 1995) ("A motion to remand based on a defect in removal procedure must be filed within 30 days after the notice of removal is filed.") (citing 28 U.S.C. § 1447(c)). Defendants do not assert any non-jurisdictional procedural defects in FDIC-R's removal. (*See generally* Def. Mot.)

defines a State action (with one exception not relevant here)[9] as one (1) to which FDIC-R "is a party other than as a plaintiff," (2) "which involves only the preclosing rights against the State insured depository institution, or obligations owning to, depositors, creditors, or stockholder by the State insured depository institution," and (3) "in which only the interpretation of the law of such State is necessary." *Id.* If a claim meets all three of these criteria, then FDIC-R has no right to remove. *See id.* Defendants assert that, even if their affirmative defense for fraud should be construed as a counterclaim, any such counterclaim for fraud would fall within the "State actions" exception precluding the court's exercise of removal jurisdiction here.

FDIC-R counters that none of the three elements required for application of the "State actions" exception is present here. (FDIC-R Resp. at 4-8.) The court need not consider the first two elements because it finds that the third is not met. FDIC-R asserts that Defendants have ignored FDIC-R's available federal defenses to the fraud counterclaim including the *D'Oench, Duhme* doctrine[10] and 12 U.S.C. § 1823(e), which will require the interpretation of federal law. (FDIC-R Resp. at 7-8.) Thus, FDIC-R argues that the third element necessary for the State actions exception to apply—an action in which only the interpretation of state law is necessary—is absent. *See* 12 U.S.C. § 1819(b)(2)(D)(iii).

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[9] *See* 12 U.S.C. § 1819(b)(2)(E).

[10] *See D'Oench, Duhme & Co. v. FDIC*, 315 U.S. 447 (1942).

In deciding whether the interpretation of federal or only state law will be necessary under 12 U.S.C. § 1819(b)(2)(D)(iii), the court is not restricted to the "well pleaded complaint" rule,[11] but may look to FDIC-R's defenses as well. *See, e.g., Diaz v. McAllen State Bank*, 975 F.2d 1145, 1149-50 (5th Cir. 1992); *Capizzi v. FDIC*, 937 F.2d 8, 1011 (1st Cir. 1991); *Lazuka v. FDIC*, 931 F.2d 1530, 1533-34, 1538 (11th Cir. 1991) (superseded by statute on other grounds); *Reding v. FDIC*, 942 F.2d 1254, 1257-58 (8th Cir. 1991). For the exception to be inapplicable, the FDIC-R must assert a defense that raises a colorable issue of federal law. *Lazuka*, 931 F.2d at 1533; *Reding*, 942 F.2d at 1258.

Defendants have described their claim as one for fraud in the inducement. (Def. Mot. at 12 ("Here the Davidyuks seek the set-off based on fraud in the inducement of a contract entered into by [Mr.] Davidyuk and Westsound bank.").) "Under *D'Oench, Duhme* and its progeny, borrowers cannot assert an unrecorded side agreement with a failed bank as a defense to their liability on a note held by the FDIC." *Resolution Trust Corp. v. Miller*, 67 F.3d 308 (9th Cir.1995). The *D'Oench*, *Duhme* doctrine was codified, in part, at 12 U.S.C. § 1823(e). *Resolution Trust Corp. v. Kennelly*, 57 F.3d 819, 822 n.3 (9th Cir. 1995). In *Langley v. FDIC*, 484 U.S. 86 (1987), the Supreme Court applied the

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[11] The well-pleaded complaint rule as applied to removal cases requires that, for a case to be removable, the complaint must initially show the existence of a federal question; federal law must create the claim. *Merrell Dow Pharmaceuticals v. Thompson*, 478 U.S. 804, 808-09 (1986). The federal question must be "presented on the face of the plaintiff's properly pleaded complaint. The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987) (citation omitted).

D'Oench, Dehme doctrine and 12 U.S.C. § 1823(e) in holding that defendants who executed a promissory note to finance a land purchase induced by affirmative misrepresentations made by the lending bank's president were estopped from asserting the defense of fraud against the FDIC as receiver of the bank. *See generally id.* Thus, both the *D'Oench, Duhme* doctrine and 12 U.S.C. § 1823(e) would appear to be colorable defenses for FDIC-R to assert with respect to Defendants' counterclaim for fraud in the inducement.[12] Numerous courts have found that FDIC's assertion of these defenses raise colorable issues of federal law. *See Diaz v. McAllen State Bank*, 975 F.2d 1145, 1149 (5th Cir. 1992); *Reding*, 942 F.2d at 1259; *Pyle v. Meritor Savings Bank*, 821 F. Supp. 1072, 1078 (E.D. Pa. 1993); *Lokey v. FDIC*, No. CV411-146, 2012 WL 1100789, at *3-4 (S.D. Ga. Mar. 30, 2012); *FDIC v. McCann*, NO. 2:10-cv-14962, 2011 WL 5039879, at *2 (E.D. Mich. Oct. 24, 2011). This court agrees. Thus, the court DENIES Defendants' motion to dismiss for lack of subject matter jurisdiction based on the "State actions" exception to FDIC-R's broad removal powers.[13]

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[12] Although FDIC-R invokes the *D'Oench, Duhme* doctrine, the Ninth Circuit has held that the doctrine does not apply where the FDIC acts as receiver for a failed bank because no federal interest exists to justify the application of federal common law. *Ledo Fin. Corp. v. Summers*, 122 F.3d 825, 828-30 (9th Cir. 1997) (discussing *Atherton v. FDIC*, 519 U.S. 213 (1997); *O'Melveny & Myers v. FDIC*, 512 U.S. 79 (1994)). The court need not decide this issue here, however, because FDIC-R's invocation of a defense based on 12 U.S.C. § 1823(e) alone is sufficient for the court to conclude that the "State actions" exception to the court's removal jurisdiction does not apply.

[13] In addition, FDIC-R has tangentially raised the issue of Defendants' failure to exhaust their administrative remedies with respect to their fraud claim. (*See* FDIC-R Resp. at 3 ("Defendants concede they have not followed FIRREA's claim procedure such that this Court is left without jurisdiction over the fraud claim.") (internal quotation marks omitted).) This is also

2. Failure to Exhaust Administrative Remedies

Defendants' second argument with respect to subject matter jurisdiction is more troubling for the court. Defendants assert that, because they have not exhausted their administrative remedies under FIRREA, the court lacks subject matter jurisdiction over any counterclaim that they may have asserted in their answer to FDIC-R's complaint. Defendants argue that because the court has no subject matter jurisdiction over counterclaim that serves as the hook for FDIC's removal (*see* Notice ¶ 7), the court may not assert subject matter jurisdiction over the proceeding as a whole. (Def. Mot. at 12-14.) Although Defendants' argument presents a perplexing jurisdictional conundrum, as discussed below, the court concludes that it nevertheless may assert subject matter jurisdiction over this proceeding.

The parties do not dispute that Defendants have failed to exhaust the mandatory FIRREA administrative-claims process outlined in 12 U.S.C. 1823(d) with respect to any counterclaim that is asserted in their answer to FDIC-R's complaint. (*See* Def. Mot. at 14; Plf. Resp. at 3.) The Ninth Circuit has repeatedly held that claimants must exhaust their administrative remedies under FIRREA before seeking judicial review and that a party's failure to so do divests the court of jurisdiction over both claims and counterclaims. *See McCarthy v. F.D.I.C.*, 348 F.3d 1075, 1079 (9th Cir. 2003) (holding that "the [12 U.S.C.] § 1821(d) jurisdictional bar is not limited to claims by 'creditors,' but extends to all claims and actions against, and actions seeking a determination of

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a defense to Defendants' fraud claim based on federal law. *See McCann*, 2011 WL 5039784, at *3.

rights with respect to, the assets of failed financial institutions for which the FDIC serves as receiver including debtors' claims"); *Intercontinental Travel Marketing, Inc. v. F.D.I.C.*, 45 F.3d 1278, 1282-83 (9th Cir. 1994) ("Because [plaintiff] failed to properly exhaust the statutorily mandated exhaustion requirements of [12 U.S.C.] § 1821(d), no jurisdiction exists over its action."); *Parker N. Am. Corp. v. Resolution Trust Corp.*, 24 F.3d 1145, 1150 (9th Cir. 1994) (citing *Resolution Trust Corp. v. Midwest Fed. Sav. Bank.*, 4 F.3d 1490, 1495 (9th Cir. 1993)); *Henderson v. Bank of New England*, 986 F.2d 319, 320-21 (9th Cir. 1993) (holding district court lacked subject matter jurisdiction because FIRREA "contains no provision granting federal jurisdiction to claims filed after a receiver is appointed but before administrative exhaustion" and "[§] 1821(d)(13)(D) strips all courts of jurisdiction over claims made outside the administrative procedures of [§] 1821").

In addition, the FDIC has repeatedly and successfully asserted in other cases that the court lacks subject-matter jurisdiction over a party's counterclaims or claims where the party has failed to exhaust FIRREA's administrative claims process. *See, e.g.*, *FDIC v. Red Hot Corner, LLC*, No. 2:11-cv-1283-JAD-PAL, 2013 WL 6244164, at *1 (D. Nev. Dec. 3, 2013) (granting FDIC's motion to dismiss in which FDIC "contend[ed] that th[e] Court lack[ed] subject-matter-jurisdiction over the counterclaims because the Defendants failed to exhaust the mandatory FDIC-review process under [FIRREA]"); *Potter v. JPMorgan Chase Bank, N.A*, No. CV 13-863 CAS (AGRx), 2013 WL 1912718, at *11 (C.D. Cal. May 8, 2013) (granting FDIC's motion to dismiss for lack of subject matter jurisdiction because plaintiffs' claims were not submitted to the claims resolution process

as required under FIRREA); *FDIC v. Twin Dev., LLC*, No. 10-cv-2279-BEN (KSC), 2012 WL 1831639, at *4 (S.D. Cal. May 18, 2012) (ruling in FDIC's favor that defendants' proposed counterclaim failed for failure to exhaust administrative remedies under FIRREA); *CADC-RADC Venture 2011-1, LLC v. Stewart*, No. 2:10-cv-00647-EJL-MHW, 2012 WL 368325, at *4-5 (D. Idaho Jan. 12, 2012) (recommending granting FDIC-R's motion to dismiss based on FDIC-R's contention "that FIRREA mandates that the [defendants] exhaust the administrative claims process related to their counterclaims before jurisdiction may attach in this Court"). Defendants argue that permitting FDIC-R to assert as a basis for the court's removal jurisdiction the very type of claim or counterclaim over which it has previously asserted the court lacked subject matter jurisdiction would be entirely inconsistent with the foregoing case authority.[14]

FDIC-R implicitly acknowledges that the court lacks subject matter jurisdiction over any counterclaims alleged by Defendants due to Defendants' failure to timely adhere to FIRREA's administrative claims process. (*See* FDIC-R Resp. at 3.) It nevertheless

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[14] In *Potter*, the plaintiffs argued that their claims against the FDIC should not be dismissed for lack of subject matter jurisdiction because "the rules requiring timely exhaustion of the administrative claims process are not jurisdictional." 2013 WL 1912718, at *5. Although the *Potter* plaintiffs acknowledged that this position ran "contrary to decades old decisions in the Ninth Circuit interpreting FIRREA, they argued that more recent Supreme Court decisions indicated a shift in the law away from interpreting statutory requirements as jurisdictional and toward interpreting such requirements as a mere element in a claim for relief. *See id.* (citing *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006); *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154 (2010); *Henderson ex rel. Henderson v. Shinseki*, --- U.S. ----, 131 S.Ct. 1197 (2011)). The *Potter* court carefully examined the Supreme Court cases at issue, as well as FIRREA's statutory language, and nevertheless concluded that a court has no subject matter jurisdiction to hear a claim against the FDIC unless the claimant had timely complied with FIRREA's administrative claims process. 2013 WL 1912718, at *5-7. Based on the *Potter* court's reasoning, this court is persuaded that timely compliance with FIRREA's administrative claim process is jurisdictional in nature.

asserts that the court has subject matter jurisdiction because Defendants asserted the claim, the "claim directly invokes this [c]ourt's subject matter jurisdiction," "and the claim has not been dismissed –voluntarily or involuntarily." (*Id.*)

The court notes that in the context of the general federal removal statue, the removal of a claim over which the court otherwise lacks subject matter jurisdiction would be improper. The general federal removal statue allows a defendant to remove to federal district court "any civil action brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a). Under this provision, "[o]nly state-court actions that originally could have been filed in federal court may be removed to federal court by the defendant." *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 392 (1987). A claim such as Defendants assert here, over which the court lacks subject matter jurisdiction due to a failure to exhaust administrative remedies, could not have been properly removed from state court under 28 U.S.C. § 1441(a) because the federal court would lack original jurisdiction over the claim. *See, e.g., Davis v. N.C. Dep't of Corrections*, 48 F.3d 134, 140 (4th Cir. 1995) ("Because the district court . . . would not have had original jurisdiction over [plaintiff's] claim, as would be true in any case where a plaintiff has yet to have his discrimination claim considered by the EEOC, it was likewise without removal jurisdiction to consider [plaintiff's] complaint."). This is so because, under the general federal removal statute, the right to remove the action depends on the nature and quality of the claim being removed. Removal must be based on a claim "of which the district courts of the United States have original jurisdiction." 28 U.S.C. § 1441(a).

The same is not true with respect to 12 U.S.C. § 1819(b)(2)(B), which is the statute underpinning FDIC-R's removal of this action. That provision states that FDIC-R "may . . . remove any action, suit, or proceeding . . . within the 90-day period beginning on the date the action, suit, or proceeding is filed against [FDIC-R] or [FDIC-R] is substituted as a party." 12 U.S.C. § 1819(b)(2)(B). Thus, removal under this provision is not dependent on the nature of the claim asserted but on the status of FDIC-R as a party. Similarly, section 1819(b)(2)(A), which defines the court's general jurisdiction over suits involving FDIC-R, states that (with the exception of "State actions") "all suits of a civil nature at common law or in equity to which [FDIC-R], in any capacity, is a party shall be deemed to arise under the laws of the United States." 12 U.S.C. § 1819(b)(2)(A). Thus, once again, Congress defined the court's jurisdiction in relation to the status of FDIC-R as a party in the suit rather than the nature of the claim involved. *See Kirkbride v. Continental Cas. Co.*, 933 F.2d 729, 731-32 (9th Cir. 1991) ("We reaffirm that the grant of subject matter jurisdiction contained in FDIC's removal statute evidences 'Congress' desire that cases involving FDIC should generally be heard and decided by the federal courts.'") (quoting *FDIC v. Nichols*, 885 F.2d 633, 636 (9th Cir. 1989)); *Carrollton-Farmers Branch Indep. School Dist. v. Johnson & Cravens, 13911, Inc.*, 889 F.2d 571, 572 (5th Cir. 1989) (FIRREA expands federal jurisdiction when FDIC is a party); *Triland Holdings & Co. v. Sunbelt Service Corp.*, 884 F.2d 205, 207 (5th Cir. 1989) (FIRREA gives FDIC very broad removal power when FDIC is a party).

The court recognizes that this circumstance creates an unusual jurisdictional anomaly. Here, the FDIC-R can remove the action based on Defendants' assertion of a

counterclaim against it, but then immediately move in federal court to dismiss the counterclaim on grounds that the court lacks subject matter jurisdiction. Although the occurrence of this circumstance may be rare, other courts have expressed concern or dismay at this outcome. *See Esponiosa v. DeVasto*, 818 F. Supp. 438, 444 n.10 (D. Mass. 1993) (noting "distaste for the 'inherent injustice that results from interpreting [FIRREA] to allow removal of a case to federal district court only to be followed by a motion to dismiss for lack of subject matter jurisdiction by the removing party'" (alterations in original) (quoting *FDIC v. Grillo*, 788 F. Supp. 641, 648 (D.N.H. 1992)). Despite the seeming "inherent injustice," this is the result required by the statutory language.

Further, the fact that the court must now dismiss Defendants' counterclaim for fraud because it lacks subject matter jurisdiction over the claim,[15] does not mean that the court is required or even permitted to remand the proceeding to state court. Irrespective of the continued vitality of Defendants' counterclaim, because the court concludes that FDIC-R properly removed this action to federal court under 12 U.S.C. § 1819(b)(2)(B), the court continues to have jurisdiction pursuant to the broad grant of jurisdictional authority found in 12 U.S.C. § 1819(b)(2)(A) over "all suits . . . to which [FDIC-R], in

[15] Even though FDIC-R has not asked for dismissal of this counterclaim, the court has an independent obligation to address *sua sponte* whether it has subject matter jurisdiction. *Allstate Ins. Co. v. Hughes*, 358 F.3d 1089, 1093 (9th Cir. 2004). The court provided notice to the parties concerning this issue (*see* Ord. Sched. Oral Argument (Dkt. # 22) at 2-4), and the parties had an opportunity to address it in oral argument to the court on June 23, 2014. Accordingly, the court dismisses Defendants' counterclaim for fraud for lack of subject matter jurisdiction due to Defendants' acknowledged failure to adhere to FIRREA's administrative claims process. *See Intercontinental Travel*, 45 F.3d at 1282-83 ("Because [plaintiff] failed to properly exhaust the statutorily mandated exhaustion requirements of [12 U.S.C.] § 1821(d), no jurisdiction exists over its action.").

any capacity, is a party " even in the absence of the claim that initially justified removal. *See Brockman v. Merbank*, 40 F.3d 1013, 1015-16 (9th Cir. 1994) ("Once the case was removed to federal court by the FDIC, the district court had original jurisdiction over all claims by virtue of the FDIC's status as a party and by virtue of the RTC's [Resolution Trust Corporation] status as a party."). Thus, under the present facts, the court lacks discretion to remand the proceeding under 28 U.S.C. 1441(c). *See Brockman*, 40 F.3d at 1017 (citing *Buchner v. FDIC*, 981 F.2d 816, 820 (5th Cir. 1993) (declining to authorize a remand where federal court had original jurisdiction over action involving FDIC)).[16]

In sum, the court concludes that FDIC-R properly removed this action pursuant to 12 U.S.C. § 1819(b)(2)(B) after Defendants filed their answer alleging a counterclaim for fraud (albeit in the form of an affirmative defense) against FDIC-R. The court also concludes that despite the court's lack of subject matter jurisdiction to hear Defendants' counterclaim, the court continues to have subject matter jurisdiction over this proceeding by virtue of the broad grant of original jurisdiction regarding any suit to which FDIC-R is a party under 12 U.S.C. § 1819(b)(2)(A). Accordingly, the court DENIES Defendants'

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[16] This case is distinguishable from *Allen v. FDIC*, 710 F.3d 978 (9th Cir. 2013), because in *Allen* the FDIC improperly removed the action from state court. The Ninth Circuit rejected the FDIC's assertion that "remand is precluded because the district court has jurisdiction under [12 U.S.C.] § 1819(b)(2)(A)." *Allen*, 710 F.3d at 984. The Court reasoned in part that if it declined to remand an action that the FDIC had improvidently removed on the ground that it had original jurisdiction under 12 U.S.C. § 1819(b)(2)(A), then nothing would stop the FDIC from improvidently removing any action to federal court. *See Allen*, 710 F.3d at 985. Indeed, the Ninth Circuit reasoned that "[a]ccepting [the FDIC's] argument would read the requirements of the removal provision out of § 1819 entirely." *Id.* Here, the court concludes that FDIC-R's removal of these proceedings from state court was proper, and thus the court's reasoning in *Allen* is inapplicable to this case.

motion to dismiss or for remand on grounds of lack of removal jurisdiction or subject matter jurisdiction.

C. Statute of Limitations

Defendants also move for summary judgment on grounds of expiration of the statute of limitations. (Def. Mot. at 15-16.) Defendants assert that the statute of limitations on FDIC-R's judicial foreclosure action is governed by RCW 4.16.04. (*Id.* at 16.) RCW 4.16.04 states (in part and subject to an exception that is not relevant here) that "[a]n action upon a contract in writing, or liability express or implied arising out of a written agreement," must be commenced within six years. RCW 4.16.04. Defendants assert that the limitations period began to run on August 10, 2008—the date upon which the note matured and became due. (Def. Mot. at 16.) FDIC-R filed the action in state court on August 29, 2012, which Defendants assert was "6 years and 19 days after the maturity date," and thus "19 days after the statute of limitations." (*Id.*) Defendants' motion for summary judgment based on expiration of the limitations period is predicated upon an obvious mathematical error. August 12, 2012, is not six years and 19 days after the maturity date, but rather only four years and 19 dates after the maturity date. Thus, the six-year statute of limitations in RCW 4.16.04 had not run by the time FDIC-R filed this action.

In any event, as FDIC-R points out, federal law extends the state law contract limitations period by providing that FDIC-R's foreclosure claim did not accrue until the date FDIC-R was appointed as Receiver of Westsound Bank on May 8, 2009. *See* 12 U.S.C. § 1821(d)(2)(14). Accordingly, FDIC-R had until May 8, 2015, to file this action.

Not only did FDIC-R file its judicial foreclosure action prior to the running of the statutory period, the statutory period has not expired to date. Accordingly, the court DENIES Defendants' motion for summary judgment based on expiration of the limitations period.[17]

D. Improper Party

Defendants also move for summary judgment dismissing Ms. Davidyuk because "there is no factual dispute that Larissa Davidyuk has no interest in the property, is not a signatory to the promissory note or deed of trust, has no equity of redemption concerning the property, and the property is being foreclosed upon to satisfy a judgment [to which] she was not a party . . . ." (Def. Mot. at 17.) FDIC-R provides no response to this aspect of Defendants' motion. (*See generally* FDIC-R Resp.) Indeed, FDIC-R implies in its response that it will stipulate to her dismissal from this lawsuit in order to further its assertion that Defendants' affirmative defenses are barred by *res judicata*. (*See id.* at 15 ("FDIC-R does not dispute that the [c]ourt may dismiss [Ms.] Davidyuk from this litigation, *without prejudice* to FDIC-R's right to assert a fraudulent transfer claim against her hereafter. Such dismissal removes any argument that the final two *res judicata* application factors have not been met.") (italics in original).) Defendants interpreted FDIC-R's statement as a willingness to stipulate to her dismissal. (Def. Reply (Dkt. # 21) at 2, 10.)

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[17] The court notes that Defendants did not refer in their reply memorandum to their motion based on the statute of limitations or respond in any way to FDIC-R's arguments in its responsive memorandum concerning the statute of limitations. (*See generally* Def. Reply (Dkt. # 21).)

At oral argument, the court inquired whether FDIC-R was in fact willing to stipulate to the dismissal of Ms. Davidyuk without prejudice to FDIC-R's right to assert a fraudulent transfer action against her at a later date if so warranted. Counsel for FDIC-R equivocated and declined to so stipulate. Counsel for Defendants correctly pointed out to the court that FDIC-R had failed to respond to this portion of Defendants' cross motion for summary judgment and, therefore, had failed to raise an issue of fact that would warrant the denial of their motion with respect to Ms. Davidyuk's liability. The court agrees. Accordingly, the court GRANTS Defendants' cross motion with respect to Ms. Davidyuk and DISMISSES her with prejudice as a party to this action.

E. Defendants' Affirmative Defenses

Defendants have asserted five affirmative defenses to FDIC-R's judicial foreclosure action. (Answer at 3.) FDIC-R posits a variety of theories as to these affirmative defenses are either not valid or do not prevent entry of summary judgment in its favor. (FDIC-R Mot. at 8-19.) The court addresses these issues below and concludes that none of Defendants' affirmative defenses prevent the court from granting FDIC-R's motion for summary judgment and entering a decree of judicial foreclosure with respect to the property at issue.

1. Judgment on the Note Does Not Bar a Subsequent Foreclosure Action

The court begins with Defendants' fifth and last affirmative defense, in which they assert that FDIC-R "obtained a money judgment against [Mr.] Davidyuk, . . . and cannot by separate action (this case) seek remedies [i.e. foreclosure] available in that case." (Answer at 3.) As FDIC-R points, "Washington case law makes clear that . . . the holder

of the real property security has the option to sue on the note, obtain a judgment, and later foreclose the security interest to satisfy any unpaid obligation of the borrower on the note." (FDIC-R Mot. at 9 (quoting *Boeing Empoyees' Credit Union v. Burns*, 272 P.3d 908, 913 (Wash. Ct. App. 2012).) The court agrees. Further, Defendants effectively abandoned this affirmative defense in response to FDIC-R by acknowledging that FDIC-R "correctly argues" that "Westsound Bank's judgment does not bar FDIC-R's foreclosure action." (Def. Mot. at 23-24.) Accordingly, the court GRANTS FDIC-R's motion for summary judgment with respect to Defendants' fifth affirmative defense.

2. *Res Judicata* Bars Fraud Set-Off Affirmative Defense

FDIC-R also asserts that all of Defendants' affirmative defenses are barred by the doctrine of *res judicata*. (FDIC-R Mot. at 9-11.) FDIC-R argues that Defendants could have asserted all of its affirmative defenses in Westsound Bank's prior action on the Note, but did not. As a result, FDIC-R asserts that Defendants are barred from raising them now. (*See id.*) The court, however, concludes that only one of Defendants' affirmative defenses—Defendants' third affirmative defense for fraud—is barred by *res judicata*.

In Washington, application of the doctrine of *res judicata* such that it will bar the assertion of a claim in a second action requires a "concurrence of identity between the two actions in four respects: (1) subject matter; (2) cause of action; (3) persons and parties; and (4) the quality of the persons for or against whom the claim is made." *U.S. Bank of Wash. v. Hursey*, 806 P.2d 245, 248 (Wash. 1991). The doctrine applies not only to claims, but to affirmative defenses as well. *See Symington v. Hudson*, 243 P.2d 484,

488 (Wash. 1952) ("[W]here a party has had a full and fair opportunity to make all of the defenses at his command, and he elects not to disclose his claim . . . , the doctrine of *res judicata* applies and he cannot later assert it.). Defendants acknowledge that FDIC-R's willingness to stipulate to the dismissal of Ms. Davidyuk "negate[s] any issues satisfying the third and fourth requirements" for application of the doctrine. (Def. Reply at 10.) Thus, the only elements at issue are the first two: identity of subject matter and cause of action.

Problematically, the prior action by Westsound Bank was based solely on the Note and was a foreclosure action. Yet, two of Defendants' affirmative defenses are specifically predicated on statutes that pertain solely to the foreclosure of real property, and a third affirmative defense is also predicated on foreclosure of the property. (*See* Answer (Dkt. # 3-20) at 3 (Aff. Defs. ## 1, 2).) For example, Defendants cited RCW 61.12.093 as the basis for their first affirmative defense that "[t]he property has been abandoned for more than six months and the lender is not entitled to a deficiency." (*Id.*) This statute provides that lack of occupancy by the mortgagor for a continuous period of six months or more prior to the decree of foreclosure, coupled with a failure to make payment upon the mortgage obligation within that six-month period is prima facie evidence of abandonment. RCW 61.12.093. Further, a mortgagee may not obtain a deficiency judgment against a mortgagor in a judicial foreclosure of improved, nonagricultural property, if the property has been abandoned for at least six months prior to the decree of foreclosure. RCW 61.12.094. The court is at a loss to understand how Defendants could have asserted a defense based on this statutory provision, which

expressly state that they are applicable "[i]n actions to foreclose mortgages on real property," RCW 61.12.093, when the prior action by Westsound Bank was solely to enforce the Note and not to foreclose on the property.

Likewise, Defendants expressly cite RCW 61.12.060 as the basis for their second affirmative defense that "[t]he court should set an asset [sic] price after the sheriff sale to determine a minimum confirmed credit to any deficiency." (Answer at 3.) The statutory provision at issue sets forth procedures for the court to fix "a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale." RCW 61.12.060. The statute expressly applies when the court is "rendering judgment of foreclosure." *Id.* Like their first affirmative defense, Defendants' second affirmative defense for an "upset price" applies only in the context of a foreclosure, which was not at issue in Westsound Bank's prior action solely on the Note.

Finally, Defendants' fourth affirmative defense asserts that FDIC-R "failed to mitigate its damages by protecting the property after it was abandoned." (Answer at 3.) Again, this defense relates to the value of the real property and any deficiency judgment that might be obtained though a foreclosure action. It does not relate to Westsound Bank's action on the Note alone. Thus, the court concludes that the first two requirements for application of *res judicata*—identity of subject matter and causes of action—are not met with respect to Defendants' first, second, and fourth affirmative defenses.

Defendants' third affirmative defense for fraud (*see* Answer at 3) is the only Affirmative Defense that the court concludes is barred by the doctrine of *res judicata*.

Defendants assert that Mr. Davidyuk "is entitled to a set off for fraud committed by the original lender [Westsound Bank] associated with false representations made to Defendants about the feasibility of the project." (*Id.*) This affirmative defense, which relates to actions and alleged misrepresentations by Westsound Bank in issuing the original Note, could and should have been raised by Defendants in Westsound Bank's action on the Note. Indeed, Defendants admit that FDIC-R "may have an argument that a fraud claim is barred by *res judicata*, because such a claim goes to the judgment on the Note." (Def. Reply at 11.) The court agrees. The subject matter and claim—alleged fraud in the inducement in making the Note at issue—are the same. As noted above, because Ms. Davidyuk is no longer a party to these proceedings, the remaining elements—related to the identity and quality of the parties—are not at issue. Thus, all of the elements for application of *res judicata* are present. *See, e.g.*, *DeYoung v. Cenex, Ltd.*, 1 P.3d 587, 594 (Wash. Ct. App. 2000) (ruling that prior grant of summary judgment to junior mortgagee in action on promissory note, which was not appealed by mortgagors, operated under doctrine of res judicata to bar relitigation of claim that defense of satisfaction barred suit on note). Thus, the court GRANTS FDIC-R's motion for summary judgment with respect to Defendants' third affirmative defense based on fraud.[18]

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[18] In addition, to the extent that this affirmative defense is properly construed as a counterclaim, the court is without subject matter jurisdiction due to Defendants' failure to adhere to FIRREA's administrative claim process. (*See supra* footnote 15.) Thus, the court dismisses Defendants' counterclaim for fraud for lack of subject matter jurisdiction.

3. Abandonment Affirmative Defense

As noted above, Defendants assert abandonment as their first affirmative defense. (Answer at 3.) Defendants argue that, pursuant to RCW 61.12.093, they abandoned the property at issue because they have never lived in it and have no intention of doing do. (Def. Mot. at 21.) As a result, Defendants assert that, pursuant to RCW 61.12.094, FDIC-R is not entitled to a deficiency judgment following foreclosure. (*Id.*) Although the court concluded that this affirmative defense is not barred by the doctrine of *res judicata* (*see supra* § III.E.2), the court concludes that Defendants are not entitled to assert their abandonment affirmative defense on other grounds.

FDIC-R argues that the Washington statutes cited above provide Defendants no relief because it is only the mortgagee—not Defendants as mortgagors—who may seek an abandonment finding under the statute. (FDIC-R Resp. at 10-12.) The court agrees. The special foreclosure provisions in RCW 61.12.093-.095 were enacted for the benefit of the mortgagee, not the mortgagor. *See ING Bank v. Korn*, No. C09–124Z, 2011 WL 1637162, at *2 (W.D. Wash. Apr. 21, 2011) (citing *Metro. Fed. Sav. & Loan Ass'n v. Rob*erts, 863 P.2d 615 (Wash. Ct. App. 1994) (holding that the provisions of RCW 61.12.093-.095 apply where "the mortgagee is willing to forego a deficiency judgment . . .")). Mortgagors, such as Defendants, are not entitled to seek a finding of abandonment and relief from a deficiency judgment. *See Korn*, 2011 WL 1637162, at *2. Indeed, the statute expressly provides that it is the mortgagee, not the mortgagor, who must plead abandonment, if the mortgagee is to obtain the right to a judicial sale free of redemption rights. *See* RCW 61.12.093. Based on the straightforward statutory language

and the Washington case authority cited above, the court concludes that Defendants, as mortgagors, are not entitled to assert this affirmative defense. Accordingly, the court GRANTS FDIC-R's motion for summary judgment with respect to Defendants' first affirmative defense.[19]

4. Mitigation of Damages Affirmative Defense

As their fourth affirmative defense, Defendants assert that FDIC-R "has failed to mitigate its damages by protecting the property after it was abandoned." (Answer at 3.) Like their first affirmative defense, although the court concluded that this affirmative defense was not barred by *res judicata*, the court concludes that FDIC-R is entitled to summary judgment on this affirmative defense on other grounds. (*See* FDIC-R Mot. at 12-15.)

FDIC-R argues, and the court is persuaded, that this affirmative defense is essentially a restatement of Defendants' affirmative defense of abandonment. (*See* FDIC-R Resp. at 16.) As discussed above, Defendants are not entitled under the statutory language of RCW 61.12.093-.094 and Washington's case authority to unilaterally eliminate the mortgagee's right to seek a deficiency judgment by abandoning the property.

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[19] Defendants reliance on *Ehsani v. McCullough Family P'ship*, Nos. 47024-8-I, 47081-7-I, 2002 WL 31106405 (Wash. Ct. App. 2002), an unpublished opinion of the Washington court of appeals, is misplaced. (*See* Def. Mot. at 21-22; Def. Reply at 7.) The court referred in passing to "abandonment of security" as one in a long list of "[r]ecognized equitable defenses." *Id.* at *3. This is the only reference to "abandonment of security" in the entire opinion, and it was not central to the court's holding. The court does not find Defendants' heavy reliance on this passing remark in an unpublished Washington Court of Appeals opinion to be persuasive.

FDIC-R also asserts that this affirmative defense is precluded by the plain language of the deed of trust. The Deed of Trust places the duty to protect the property from damage or impairment on Defendants, as follows:

> Borrower shall not destroy, damage, or impair the Property, allow the Property to deteriorate or commit waste on the Property. . . . Borrower shall maintain the Property in order to prevent the Property from deteriorating or decreasing in value due to its condition. . . . Borrower shall promptly repair the Property if damaged to avoid further deterioration or damage. . . . Borrower is not relieved of Borrower's obligation for the completion of such repair or restoration.

(RJN Ex. 1 § 7.) Further, although the Deed of Trust allows FDIC-R to secure the property, the Deed of Trust expressly disclaims any duty on the part of FDIC-R to do so and further provides that FDIC-R incurs no liability for not doing so:

> Lender may . . . secur[e] and/or repair[] the Property. . . . Although Lender may take action under this Section . . . , Lender does not have to do so and is not under any duty or obligation to do so. It is agreed that Lender incurs no liability for not taking any or all actions authorized under this Section . . . .

(*Id.* Ex. 1 § 9.) Thus, the language of the Deed of Trust expressly obviates Defendants' affirmative defense, which is premised on a duty on the part of FDIC-R to protect the property that is expressly disavowed by the contract or deed of trust.

Defendants counter that "[c]ontract interpretation is normally a question of fact for the fact-finder," citing *Berg v. Hudsman*, 801 P.2d 222 (Wash. 1990). (Def. Mot. at 27.) Defendants misstate Washington law. Under Washington law, the interpretation of a contract can be a mixed question of law and fact. *Mut. of Enumclaw Ins. Co. v. USF Ins. Co.*, 191 P.3d 866, 875 n.9 (Wash. 2008)). However, where the contract presents no ambiguity and no extrinsic evidence is required to make sense of the contract terms,

contract interpretation is a question of law. *Id.*; *see also Tanner Elec. Coop. v. Puget Sound Power & Light*, 911 P.2d 1301, 1310 (Wash. 1996) ("Interpretation of a contract provision is a question of law only when (1) the interpretation does not depend on the use of extrinsic evidence, or (2) only one reasonable inference can be drawn from the extrinsic evidence.").

Nevertheless, Defendants baldly "dispute that the contract language . . . should be interpreted to mean that they agree to contract away their defense of mitigation of damages, and assert that a more reasonable interpretation is that the contract holds that the bank could not be held liable for damages to others caused by the property falling into a state of disrepair." (Def. Mot. at 27.) Defendants cite no language in the Deed of Trust to support the restriction on the bank's limitation of liability that they posit. In the absence of any such language, they make no argument as to why the language at issue is ambiguous or why interpreting the provisions of the Deed of Trust in the manner they propone would be reasonable. Further, they present no extrinsic evidence in support of their position. Thus, they raise no factual issue with respect to the contract language at issue, and the court therefore interprets the language in the Deed of Trust as a matter of law.

Finally, the court also agrees with FDIC-R that where an action, such as this one, is to collect on an unpaid debt and not for damages, there is no duty to mitigate. *Metropolitan Mortg. & Secs. Co., Inc. v. Becker*, 825 P.2d 360, 363 (Wash. Ct. App. 1992). Accordingly, the court grants FDIC-R's motion for summary judgment with respect to Defendants' fourth affirmative defense.

5. Upset Price Affirmative Defense

The only affirmative defense that remains is Defendants' second affirmative defense that "[t]he court should set an asset [sic] price after the sheriff sale to determine a minimum confirmed credit to any deficiency as allowed in RCW 61.12.060." (Answer at 3.) RCW 61.12.060 provides:

> In rendering judgment of foreclosure, the court shall order the mortgaged premises, or so much thereof as may be necessary, to be sold to satisfy the mortgage and costs of the action. The payment of the mortgage debt, with interest and costs, at any time before sale, shall satisfy the judgment. The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing, fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale.
>
> The court may, upon application for the confirmation of a sale, if it has not theretofore fixed an upset price, conduct a hearing, establish the value of the property, and, as a condition to confirmation, require that the fair value of the property be credited upon the foreclosure judgment. If an upset price has been established, the plaintiff may be required to credit this amount upon the judgment as a condition to confirmation. If the fair value as found by the court, when applied to the mortgage debt, discharges it, no deficiency judgment shall be granted.

Id. Under this language, Defendants' request for an upset price is a matter left to the court's discretion, and the court determines any such upset price only after entry of the foreclosure decree. *See id.* Thus, Defendants' minimum or upset price request does not prevent the court from granting FDIC-R's motion for a decree of foreclosure on summary judgment and an order directing the sale of the property. Defendants do not dispute this interpretation of the statutory provisions (*see generally* Def. Mot.), and the court concludes that Defendants' request for an upset price does not prevent entry of summary judgment as requested by FDIC-R. Thus, there is no reason for the court to rule with

respect Defendants' second affirmative defense at this time, and accordingly, the court reserves judgment on this issue.

F. FDIC-R's Motion for Summary Judgment Decree of Judicial Foreclosure

FDIC-R seeks a summary judgment decree of judicial foreclosure for the subject property. (*See generally* FDIC-R Mot.) As discussed above, the court has disposed of all of Defendants' affirmative defenses by either granting summary judgment in FDIC-R's favor or concluding that they do not otherwise prevent entry of summary judgment decree of judicial foreclosure in FDIC-R's favor. (*See supra* § III.E.) The court now considers whether FDIC-R is entitled to a decree of judicial foreclosure on summary judgment.

There is no dispute that on May 8, 2009, Westsound Bank was closed by the Washington Department of Financial Institutions, and FDIC-R was appointed as Westsound Bank's receiver. (RJN Ex. 7; Rossiter Aff. ¶ 10.) When FDIC-R is appointed as receiver of a financial institution, it succeeds to "all rights, titles, powers and privileges of" the failed institution. 12 U.S.C. § 1821(d)(2)(A)(i). It may "take over the assets of and operate" the failed institution with all the powers thereof. 12 U.S.C. § 1821(d)(2)(B)(i). Thus, FDIC-R "was and remains the appropriate party in interest" in matters relating to Westsound Bank's assets. *See Yelomalakis v. FDIC*, 562 F.3d 56, 60 (1st Cir. 2009).

There is also no dispute that judgment was entered against Mr. Davidyuk on the Note two days before Westsound Bank failed. (RJN Ex. 5; Rossiter Aff. ¶ 9.) That judgment, along with the Deed of Trust, are now assets of FDIC-R. There is no dispute

that Defendants have made no payment on the default judgment to either Westsound Bank or FDIC-R since it was entered. (Rossiter Aff. ¶ 11.) Accordingly, as the holder of the beneficial interest in the modified Deed of Trust, and successor-in-interest to the judgment creditor, Westsound Bank, FDIC-R has all the same rights, powers, and privileges with respect to those instruments as did Westsound Bank, and is equally entitled to enforce and collect on them. Because there are no genuine issues of material fact concerning the foregoing, FDIC-R is entitled to a decree of judicial foreclosure with respect to the property at issue and the court therefore GRANTS FDIC-R's motion for summary judgment on that issue.

G. FDIC-R's Request for Attorney's Fees

The Deed of Trust provides for the recovery of reasonable attorney's fees and costs "in any action or proceeding to . . . enforce any term of this Security Instrument." (RJN Ex. 1 at 11 (§ 26); *see also id.* at 8 (§ 14, which states, "Lender may charge Borrower fees for services performed in connection with Borrower's default, . . . including, but not limited to attorney's fees").) Defendants assert that the court should decline to award any fees because FDIC-R "is not entitled to a deficiency judgment and could have obtained the same result through the far less costly non-judicial foreclosure process under Washington's Deed of Trust Act." (Def. Mot. at 28.) Defendants cite no authority for the proposition that FDIC-R is not entitled to a deficiency judgment. Indeed, at this point, whether the judgment that will be enforced through foreclosure will result in any deficiency judgment is unknown and cannot be known until the sale is confirmed. In any event, Washington's Deed of Trust Act expressly provides that lenders

retain the right to foreclose deeds of trust as mortgages. *See* RCW 61.24.020; *Wash. Fed. v. Gentry*, 319 P.3d 823, 827 (Wash. Ct. App. 2014) ("[T]he act expressly provided that lenders retained the right to foreclose deeds of trust as mortgages."). Accordingly, the court GRANTS FDIC-R's motion for an award of reasonable attorney's fees. The court will determine the amount of such fees following FDIC-R's submission of a request for a specific amount, opportunity for a response by Defendants, and a determination of reasonableness by the court.

IV. CONCLUSION

Based on the foregoing, the court GRANTS FDIC-R's motion for summary judgment seeking a decree of judicial foreclosure on the subject property and an award of reasonable attorney fees and costs under the Deed of Trust (Dkt. # 9). The court will award a specific amount of fees and costs following further submissions from the parties. In addition, the court DENIES Defendants' cross motion for summary judgment, except with respect to its motion concerning Ms. Davidyuk (Dkt. # 12). With respect to Ms. Davidyuk, the court GRANTS Defendants' motion and DISMISSES her with prejudice from this action.

Dated this 25th day of June, 2014.

JAMES L. ROBART
United States District Judge